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Nos. 93-56344, 93-56368, 93-56501

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

SARATOGA FISHING CO.,

Petitioner,

vs.

J.M. MARTINAC & CO. and MARCO SEATTLE, INC.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION BY ALL ALASKAN SEAFOODS, INC. TO FILE *AMICUS CURIAE* BRIEF

Consent to File *Amicus Curiae* Brief Granted by Saratoga Fishing Co., and denied by Respondents

Michael H. Williamson
Madden, Poliak,
MacDougall & Williamson
1001 Fourth Ave. Plaza, Ste. 2800
Seattle, Washington 98154-1106
(206) 621-1011

Steven B. Fisher
Kostow & Daar
200 South Wacker Dr., Ste. 3800
Chicago, Illinois 60606
(312) 474-1404
Attorneys for All Alaskan Seafoods, Inc.

Application for Leave to File a Brief as *Amicus Curiae*

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MOTION BY ALL ALASKAN SEAFOODS, INC.
TO FILE *AMICUS CURIAE* BRIEF

Applicant, ALL ALASKAN SEAFOODS, INC. ("AAS"), moves the Court for permission to file an *amicus curiae* brief in support of Saratoga Fishing Co.'s ("Petitioner") position in the captioned matter. Petitioner has consented to AAS filing an *amicus* brief, although Respondents have refused. Accordingly, leave to file must be sought pursuant to Rule 37.2

NATURE OF APPLICANT'S INTEREST

I. AAS'S INTEREST LIES IN THE UNIFORM AND WORKABLE ADMINISTRATION OF MARITIME LAW.

Applicant has a very strong interest in the disposition of this case, since it threatens to undermine traditions of admiralty practice which have been observed in this country since it was first settled, and which have been recognized in the Constitution as well as statutes and rules of procedure enacted thereafter.

AAS is a Washington corporation, owns and/or operates numerous commercial crab fishing and commercial crab processing vessels operating in U.S. and Russian waters. AAS and affiliated companies employ roughly 250 employees, engaged in catching and processing crab, on a yearly basis. While it is by no means a "seller" engaged in the business of placing products into the stream of commerce, it has on occasion purchased second hand vessels and fishing equipment from private concerns. Likewise, in the past it has sold outdated equipment to other private concerns, equipment that, subsequent to its original acquisition, was customized to meet AAS's particular needs.

The *Saratoga*[1] decision greatly impacts not only AAS's potential liability arising out of commercial transactions, but may indeed have a direct impact on how it deals with others in the course of such transactions.

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[1] *Saratoga Fishing Co. v. Marco Seattle, Inc.*, 69 F.3d 1432 (9th Cir. 1995).

II. AAS SEEKS TO INTERVENE AS *AMICUS CURIAE* AS THE NINTH CIRCUIT'S DECISION ADVERSELY AFFECTS ADMIRALTY RULES AND THE UNIFORMITY OF ADMIRALTY LAW.

In *Merchants' National Bank of Mobile v. The Dredge Gen. G.L. Gillespie*,[2] the Fifth Circuit recognized that admiralty principals are unique. Admiralty includes concepts and procedures which are separate and distinct from the common law. These concepts and procedures date to the middle ages and have evolved over time to accommodate and meet the needs of international trade and commerce.

The *Gillespie* court recognized that:

> The Federal Courts have a great responsibility to speak consistently in maritime controversies because of their recognized national and international significance. They must take care not to fashion rules and exceptions for a particular circumstance without assessing their impact in other situations. The rules and procedures in the maritime environment must apply equally to gigantic ocean-going oil tankers traveling from the Middle East to Japan and to small inland barges . . . 663 F.2d at 1347.

The federal courts are responsible for applying admiralty law consistently and uniformly when confronted with products liability admiralty actions. The product

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[2] 663 F.2d 1338, 1346-51 (5th Cir. 1980), *cert. denied*, 456 U.S. 966 (1982).

liability rules which they fashion must apply equally to vessels which travel between circuits and those vessels which do not leave the boundaries of a single circuit. The Ninth Circuit's decision in *Saratoga* threatens the uniformity which the federal courts have sought to assure in products liability admiralty actions. The decision creates a conflict among the circuits and all but repudiates established precedent within such Circuit. The Supreme Court has accepted Saratoga Fishing's request that it carefully review the Ninth Circuit's decision in an earnest attempt to remove this conflict and clarify the holding of the Court's landmark decision in *East River*.[3]

Like the court in *Gillespie*, this Court has often recognized the need for uniformity in maritime matters.[4] Uniformity will become impossible to maintain if the circuits apply different products liability rules in the maritime products liability setting.

In order to preserve the uniform and effective administration of maritime law, this Court must reverse the

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[3] *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

[4] See, for example, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Moragne v. State Marine Lines*, 398 U.S. 375 (1970); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953); *London Co. v. Industrial Commission*, 279 U.S. 109 (1929); *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919); *Chelentis v. Luckenback S.S. Co.*, 247 U.S. 372, 382 (1918); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216-217 (1916); and *Lord v. Goodall*, 102 U.S. 541 (1881).

Ninth Circuit decision in *Saratoga*.

III. FOLLOWING *SARATOGA*, AND ABANDONING THE ESTABLISHED, COMMON SENSE REASONING OF THE FIFTH CIRCUIT IN *NICOR*, HAS ALREADY LED TO HORRIBLE CONSEQUENCES WHICH WILL NO DOUBT CONTINUE.

AAS, having suffered the wrath of *Saratoga* first-hand, can offer the Court a unique and separate perspective, as both a commercial processor and a consumer damaged by a defective and dangerous product, from that of *Saratoga* in the present case.

On July 24, 1994, the M/V ALL ALASKAN, a seafood processing vessel was destroyed in a tremendous fire which caused more than $100 million in property and related damages, the death of one crewman, and personal injuries of over 40 crewmen.

The vessel was purchased by AAS in the summer of 1987 and, ultimately, converted to a seafood processing vessel for use in Russian waters. In 1990, AAS installed what is commonly referred to as pipe heating cable to a section of drainage pipe in one of the vessel's cargo holds. The cable was to keep the pipes from freezing in sub-zero temperatures.

Less than a month before the fire, AAS transferred the vessel - as outfitted for seafood processing - to a joint venture ("AAS-DMP") created to handle AAS's Russian fishing operations.

AAS claims that the fire which destroyed the vessel was caused by defective heating cable which had been

installed in the vessel. The manufacturer of the heating cable, RAYCHEM CORPORATION, was not in the business of selling fishing vessels although it was well aware that its products were being used in marine applications such as that employed by AAS.

Upon RAYCHEM's Motion for Partial Summary Judgment, The Honorable Judge Barbara Jacobs Rothstein, United States District Judge for the Western District of Washington, at Seattle, dismissed the overwhelming majority of AAS's claim, based almost exclusively on *Saratoga* and the Ninth Circuit's misinterpretation of *East River*.

Judge Rothstein held - based entirely on the Ninth Circuit's analysis in *Saratoga* - that "the vessel" that internally transferred for tax purposes from AAS to AAS-DMP was "the product," including the heating cable that had been added by AAS years following the original purchase of the vessel in 1987. Under the District Court's analysis, there was no "other property" damage. [A true and correct copy of Judge Rothstein's Ruling is attached hereto and marked Exhibit "A"]. AAS is interested as *amicus curiae* in that a clarification of the strict liability principals of *Saratoga* may not encompass the issues involved in the litigation between AAS and RAYCHEM CORPORATION as decided in Judge Rothstein's ruling.

Judge Rothstein clearly followed *Saratoga*, as she was obliged to do. Her ruling - as does *Saratoga* - undermines the doctrine of strict products liability, by making AAS the purported "seller" of a defective product to itself. Had the fire occurred two weeks earlier, RAYCHEM CORPORATION would have had no defense to AAS's action.

Clearly, *East River* was never intended to shield

manufacturers from the consequences of their actions based on the "luck of the draw," i.e., a manufacturer's liability depends on whether or not it is lucky enough to have its product incorporated into another's and then resold.

AAS will concentrate only on the nature of admiralty practice, the manner in which the Ninth Circuit's decision conflicts with decisions of this Court, prior Ninth Circuit decisions, and other circuit courts of appeal, as well as upon the detriment to admiralty practice which will result if the Ninth Circuit's decision in *Saratoga* is allowed to stand.

WHEREFORE, ALL ALASKAN SEAFOODS, INC. respectfully requests that this Honorable Court, pursuant to Rule 37.2, grant its Motion to proceed *amicus curiae* in the instant action.

DATED this 27th day of November, 1996.

RESPECTFULLY SUBMITTED

Michael H. Williamson
Madden, Poliak, MacDougall & Williamson
1001 Fourth Avenue Plaza, Suite 2800
Seattle, Washington 98154-1106
(206) 621-1011

Steven B. Fisher
Kostow & Daar
200 South Wacker Drive, Suite 3800
Chicago, Illinois 60606
(312) 474-1404
Attorneys for All Alaskan Seafoods, Inc.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALL ALASKAN SEAFOODS, INC., AAS-OMP MANAGEMENT PARTNERSHIP, L.P. by KODIAK MARINE PROTEIN, INC., General Partner, Holding Company DALMOREPRODUCT, SANDRA KEGLEY, Individually, on behalf of her minor children, and as Personal Representative of the Estate of KYLE LYNN SMITH, and SHIN NIHON GLOBAL CO., LTD.,	
Plaintiffs,	NO. C96-351R
v.	ORDER GRANTING DEFENDANT RAYCHEM'S MOTION FOR PARTIAL SUMMARY JUDGMENT
RAYCHEM CORPORATION,	
Defendant and Third-Party Plaintiff,	
v.	
MARINE ELECTRIC, INC.,	
Third-Party Defendant.	
MARINE ELECTRIC, INC.,	
Fourth-Party Plaintiff,	
v.	
WESTINGHOUSE ELECTRICAL SUPPLY CO.,	
Fourth-Party Defendant.	

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WESTERN DISTRICT OF WASHINGTON AT SEATTLE
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THIS MATTER comes before the court on a motion for partial summary judgment by defendant and third party plaintiff Raychem Corporation. Having reviewed the motion together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

On July 24, 1996, a fire broke out on board the P/V ALL ALASKAN, a seafood processor operating in the Bering Sea. The fire caused extensive damage to the vessel as well as the death of one crewmember and personal injury to numerous others. Plaintiffs All Alaskan Seafoods, Inc. ("AAS") and AAS-OMP Management Partnership, L.P. ("AAS-OMP") sued defendant Raychem Corporation under strict liability and negligence theories on the grounds that the fire was caused by defects in heating cable manufactured by Raychem.

Raychem now moves for partial summary judgment based on the economic loss rule adopted by the United States Supreme Court in East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), and applied by the Ninth Circuit in Saratoga Fishing Co. v. Marco Seattle, Inc., 69 F.3d 1432 (9th Cir. 1995). The economic loss rule provides that a plaintiff cannot recover in tort for damages resulting from a product harming itself. Thus, the economic loss stemming from the damage to the product itself such as repair costs, decreased value and lost profits is not recoverable in tort. However, harm to persons and property other than the product is compensable under a tort theory.

The underlying rationale of the economic loss rule is that contract law, particularly the law of warranty, is the proper

mechanism for addressing controversies over product malfunction where the alleged damage is to the product itself. Raychem accordingly contends that plaintiffs cannot recover in tort for any property damage to the vessel itself resulting from a malfunction of an integrated vessel component like the heating cables.

Plaintiffs AAS and AAS-DMP present two types of responsive argument:

1. Legal and factual distinctions.

First, plaintiffs argue that the situation in this case is legally and factually distinguishable in several ways from those in East River and Saratoga Fishing. The court finds no basis for this argument. Saratoga Fishing is especially apposite, involving as it does a fire aboard a fishing vessel allegedly caused by a defect in the design of the hydraulic system. The Ninth Circuit concluded in Saratoga Fishing that plaintiff could not recover tort damages from the system designer for harm to the finished vessel because that was the product which plaintiff had purchased.[1]

Nor is there any basis for plaintiffs' argument that tort recovery is permitted under East River when, in addition to damaging itself, the product also causes personal injury or damage

[1]Plaintiffs contend that the court should not rely on Saratoga Fishing because it postdated the fire in this case and established new precedent which should not be applied retroactively. On the contrary, Saratoga Fishing did not announce any new legal principle, but simply applied the holding of East River to a particular fact situation.

to other property. In Saratoga Fishing, the fire not only damaged the vessel, but also other property. The Ninth Circuit carefully distinguished between the two, finding that recovery of tort damages was permissible for the latter harm, but not the former.

There is no basis in applicable caselaw for plaintiffs' argument that the gravity or catastrophic nature of the harm makes any difference to their ability to recover tort damages for harm to the product itself. As for plaintiffs' contention that the heating cable was not an integral component of the vessel because it was not necessary to the basic functioning of the vessel, the court finds that the heating cable was an integral part of the vessel within the meaning of the economic loss rule as explicated in East River and Saratoga Fishing. Nothing in the rationale of East River requires that the malfunctioning part of the product must be essential to its basic operation.

Regarding plaintiffs' failure to warn claims, they are also subject to the economic loss rule enunciated in East River. Even assuming that some exception to the rule might exist for failure to warn claims arising after the sale of a product or integral component of a product, Raychem's alleged awareness of a defect in the heating cable predated the sale and installation of the cable and the ensuing fire aboard the P/V ALL ALASKAN by many years. If plaintiffs were allowed to circumvent the economic loss rule simply by alleging a failure to warn about a pre-existing defect, the exception could well swallow the rule. East River and its progeny give no indication that this result was intended.

2. Ownership of the vessel.

Plaintiffs' other line of argument focuses on the ownership of the vessel at the time of the fire. Raychem's contention is that plaintiff AAS-DMP owned the vessel on July 24, 1994 and that AAS has no standing to bring this action because it sold the vessel to AAS-DMP effective July 5, 1994. Raychem further argues that as the purchaser of the vessel of which the heating cable was an integral component, AAS-DMP is bound by the economic loss rule set forth in East River.

Raychem bases its ownership allegations on the fact that plaintiffs recorded a bill of sale with the United States Coast Guard reflecting the transfer of the vessel's ownership from AAS to AAS-DMP on July 5, 1994. AAS-DMP also claimed ownership of the vessel when it applied for and received the insurance proceeds for losses suffered as a result of the fire. AAS-DMP further represented to the Internal Revenue Service that it was the owner of the vessel at the time of the fire and received the attendant tax benefits to be derived from that status.

AAS and AAS-DMP now seek to convince the court that AAS-DMP was not really the owner of the vessel on July 24, 1994 because there was no effective transfer of ownership until May 24, 1995 when the bill of sale was recorded with the United States Coast Guard.

The court is not persuaded. Every piece of evidence in the record including written documents by plaintiffs themselves and the actions which they took after the fire is consistent with

Raychem's contention that the transfer of ownership of F/V ALL ALASKAN took effect on July 5, 1994. The fact that the bill of sale was not recorded until much later has no bearing on when the parties reached agreement about the transfer of ownership or when that transfer was legally effective.

In a final attempt to escape the legal implications of the transfer of ownership, plaintiffs contend that even assuming the transfer took place on July 5, 1994, it had no legal meaning because AAS and AAS-DMP are, as a practical matter, one and the same entity. In essence, plaintiffs are contending that the transfer was a sham transaction from which they derived the intended financial benefits, but which should now be disregarded because it also entails some adverse legal consequences. The court refuses to be a party to plaintiffs' attempt to escape the full legal ramifications of a contract into which they freely and voluntarily entered and from which they have profited.

Defendant Raychem's motion for partial summary judgment is GRANTED.

DATED at Seattle, Washington this 7th day of June, 1996.

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

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BRIEF OF ALL ALASKAN SEAFOODS, INC., *AMICUS CURIAE*, IN SUPPORT OF SARATOGA FISHING CO.'S WRIT OF CERTIORARI GRANTED BY THE COURT ON OCTOBER 15, 1996

Michael H. Williamson
Madden, Poliak,
MacDougall & Williamson
1001 4th Ave. Plaza, #2800
Seattle, Washington 98154
(206) 621-1011

Steven B. Fisher
Kostow & Daar
200 S. Wacker Dr., #3800
Chicago, Illinois 60606
(312) 474-1404
Attorneys for
All Alaskan Seafoods, Inc.

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All Alaskan Seafoods, Inc. ("AAS") respectfully submits this Brief as *amicus curiae* in support of Saratoga Fishing Co.'s Writ for Certiorari which was granted by this Honorable Court on October 15, 1996.

QUESTION OF LAW PRESENTED

Whether the Ninth Circuit's approach in defining "other property" damage for purposes of invoking the "economic loss rule" undermines the Doctrine of Strict Products Liability as adopted in this Court's decision in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

I.

THE NINTH CIRCUIT'S DECISION IN *SARATOGA* IMPROPERLY DEFINES "THE PRODUCT" FOR STRICT LIABILITY PURPOSES AS THE LAST OBJECT TRANSFERRED WITHOUT TAKING INTO ACCOUNT WHAT ALLEGEDLY DEFECTIVE ARTICLE THE MANUFACTURER ACTUALLY SUPPLIED TO THE INITIAL PURCHASER

In *Saratoga Fishing Co. v. Marco Seattle, Inc.*, 69 F.3d 1432 (9th Cir. 1995), the Court of Appeals for the Ninth Circuit denied recovery to a fishing vessel owner for items of personal property which had been added by the original owner subsequent to the initial sale. Specifically, following the "first sale" by the manufacturer of the vessel (J.M Martinac & Co.) to the initial owner (Joseph Madruga), the vessel was outfitted with a seine and other fishing equipment.

Two years after the first sale of the vessel to Joseph Madruga ("Madruga"), it was purchased by Manual S. Vargas, Jr. Corporation ("second sale"), which thereafter changed its name to Saratoga Fishing Co. (hereinafter referred to collectively as "Saratoga"). The purchase price of the vessel at the time of this "second sale" included the seine, five speed boats, a skiff, electronic equipment, fuel, spare parts and other miscellaneous items which had been installed,

or otherwise placed upon the vessel following the first sale.

The Ninth Circuit, while affirming Saratoga Fishing Co.'s right to recover tort damages for its lost tuna catch, reversed the District Court's decision which allowed tort recovery for damages to property which had been placed upon the vessel as of the date title had passed to Saratoga via the second sale. According to the Court of Appeals, while the lost tuna catch amounted to "other property" - separate and distinct from that which was transferred at the time of the second sale - the remaining items for which recovery was allowed did not. *Id.* at 1445.

In so holding, the Ninth Circuit in a 2-1 opinion reasoned:

> The vessel that Martinac sold to Madruga constituted the 'product' as far as Madruga was concerned. We must decide whether the 'product' changed when Madruga added various components . . . and resold it to Saratoga Fishing.
>
> * * *
>
> Here, the purchaser is Saratoga Fishing and the object of its bargain was the M/V SARATOGA with the components already installed. Saratoga Fishing purchased the vessel 'as is.'
>
> * * *
>
> Saratoga Fishing is the second buyer in this case. We must therefore focus on its agreement with Madruga. We see no reason to extricate Saratoga Fishing from its bargain . . . The 'product' in this case is the

> vessel that was delivered to Saratoga Fishing. Because it included the skiff, net, fuel, spare parts, and miscellaneous equipment, those items are part of the product and are not recoverable in a tort action as 'other property.'

Id. at 1444 - 1445.

By focusing its inquiry on the second sale, the Ninth Circuit insulated J.M. Martinac & Co. ("Martinac") and Marco Seattle, Inc. ("Marco") from the direct and foreseeable consequences of placing an unreasonably dangerous piece of machinery, the vessel's hydraulic system, into the stream of commerce although as a result of the equipment's premature failure, personal property which neither defendant supplied sustained damage. Since the property damaged was not designed, manufactured or supplied by Martinac or Marco, it must be viewed as "other property" damage for which recovery in tort may lie.

In determining what constitutes "the product" for strict liability purposes and, thus, what is to be deemed damage other than to "the product" itself, the appropriate focus must be on the original manufacturer and its sale to the initial user. Stated in its simplest terms, only one question need be asked: "What product did the original manufacturer supply at the time the allegedly defective product was placed on the market?" Acting Justice Noonan, in his concurring and dissenting opinion, recognized the inherent fallacy of the majority's reasoning, when he noted:

> I concur in the opinion of the court, except as to its exclusion of damages for the skiff, seine net, fuel, spare parts and other miscellaneous equipment sold by Madruga to Saratoga Fishing . . . ***None of this property was manufactured or sold by Martinac*** . . . Saratoga Fishing is here the ultimate consumer; Martinac is the original seller; ***the property damaged was Saratoga Fishing's and no more a part of the product sold by Martinac than was the tuna catch for which damages are granted.***

Id. at 1447 (emphasis added).

The Ninth Circuit too - at least upon its initial consideration of the issue presented -realized that the appropriate point to begin its analysis was to determine not what had been sold to Saratoga in 1974, but instead, what had been supplied by Martinac to Joseph Madruga in 1972, at the time of the "first sale."[1]

In its original opinion, issued April 25, 1995, the Court of Appeals noted:

> We agree with the Fifth Circuit's approach. Defining the product as the object of the contract between the manufacturer and purchaser comports with the language and policy of *East River*. A product liability plaintiff is not able to recover for economic losses resulting from the loss of the vessel, but can recover damages for items added to the vessel by its

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[1] The final decision of the Ninth Circuit upon which Saratoga Fishing Co. seeks review from the Court actually represents one of three written opinions issued by the panel. The original opinion of the panel was issued on April 25, 1995. This opinion was later modified on August 4, 1995 and modified yet again on October 26, 1995. The reason for the changes are unclear.

> user. Because the *East River* court focused primarily on the role of warranty and contract law as the reason for limiting recovery of product liability damages, it is logical that when items are added to a vessel outside the scope of any warranty of contract between ***the initial purchaser and manufacturer***, they are other property.

[Appendix D to Saratoga's Petition for Writ of Certiorari, p. 107a] (emphasis added).

The Appellate Court continued:

> Marco and Martinac argue that most of the damages in this case . . . were attributable to the product itself. We disagree . . . [A]dditions to a vessel should be considered other property 'separate from the product that the manufacturer *originally* sold . . . ." . . . Although all of the . . . components were integral to the operation of the vessel, they were not part of the vessel that Martinac sold to McDruga [sic] in 1972. They were added later. Including these items as part of the 'product' would undermine the 'other property' exception . . . The items for which the district court awarded damages are inherently different from those component parts that were part of the vessel when it was delivered . . .

[Appendix D to Saratoga's Petition for Writ of Certiorari, p. 108a].

Focusing on what a manufacturer supplies at the time its goods are first placed on the market effectively establishes parameters of accountability and, at the same time, promotes the public policy concerns which gave rise to the creation of

"strict liability," mainly the protection of the downstream consuming public against unreasonably dangerous and defective products which cause injury or damage when used in an intended and foreseeable manner.[2] Viewing "the product" from the manufacturer's perspective further maintains the line of demarcation between tort and contract which the Court in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) sought to achieve.[3]

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[2] See, *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963) (where the court held that a manufacturer is "strictly liable" in tort when he places an article on the market, knowing it is to be used without inspection for defects, which proves to have a defect which, in turn, causes injury.)

[3] As a practical matter, contrary to the majority's opinion in *Saratoga*, focusing on the point at which the manufactured article first enters the marketplace actually promotes certainty in evaluating tort liability. Manufacturers and sellers of products will know in advance that they will remain accountable for all foreseeable consequences which result through the use of their products, as contemplated by The *Restatement (Second) of Torts*, Section 402A. The end result, however, will be that products will be safer. While the public will be better off, the liability of those in the chain of distribution will by no means be unlimited. The ever-present barriers which have always existed (e.g., statutes of limitations and repose, affirmative defenses such as unforeseeable misuse and assumption of the risk, distributor statutes which limit liability to those who actually manufacture defective products, etc.) will still exist as a means of curtailing overall responsibility.

The Fifth Circuit's approach, initially embraced but later abandoned by the Ninth Circuit, provides a straightforward and workable means by which a manufacturer's liability may be measured. The rule enunciated in *Nicor Supply Ship Assoc. v. General Motors*, 876 F.2d 501 (5th Cir. 1989), that a manufacturer is to be judged in terms of what it originally placed on the market, need not be changed, and certainly need not be set aside.

Accordingly, the Ninth Circuit should have left its original opinion of April 25, 1995 intact and, thus, maintained consistency among the Circuits.

The Ninth Circuit's decision must be reversed.

A.

The Ninth Circuit's "Change of Heart" is at Odds With the Court's Reasoning in *East River*

The Ninth Circuit in its first revised and final written opinions interpreted *East River* as mandating that "the product" for strict liability purposes be defined by the contract between Madruga and Saratoga. *Saratoga*, 69 F.3d at 1445. In the Appellate Court's view, the "object of the bargain" insofar as Saratoga was concerned was the M/V SARATOGA, a vessel sold "as is" by Madruga with the components already in place. *Id.* at 1444. Finding no reason to "extricate" Saratoga from the deal it had struck with Madruga for the sale of the vessel, the Court denied recovery in tort for those items which had been added subsequent to the "first sale." The reasoning adopted by the Ninth Circuit, however, is contrary not only with other circuits which have

had occasion to address the issue,[4] but wholly inconsistent with the approach adopted by the Court in *East River*.

Although the ultimate effect of *East River* was to differentiate between damages recoverable in tort and those recoverable in contract, the Court's analysis embraced two distinct issues of law. The first issue addressed by the Court was whether a commercial product injuring only itself was the type of harm against which public policy required manufacturers to protect. *East River*, 476 U.S. at 866. In other words, the Court's initial inquiry was to determine whether products liability applied to a case where only the product itself sustained damage. Once it determined that a tort action would not lie in such a situation, it then sought to apply its holding to the facts presented. For this purpose, the Court needed to define "the product" in order to ascertain whether or not "other property" damage was present.

In this part of the Court's analysis, i.e., in attempting to define "the product," the Court did not look at the "object"

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[4] As noted, the Ninth Circuit acknowledged in its original opinion of April 25, 1995, that the Fifth Circuit in *Nicor, supra,* held that in defining "the product" for strict liability purposes under *East River*, the focus must be on what article changed hands at the time the initial purchaser took possession of the item supplied by the original manufacturer. *See also Mays Towing Co. v. Universal Mach. Co.*, 755 F.Supp. 830, 833 (S.D. Ill. 1992) (where the district court held that, under *East River*, it was necessary to look only at what the manufacturer sold, i.e., engines which were subsequently installed within plaintiff's towboat, in order to ascertain what "the product" was for purposes of determining the existence of "other property" damage).

of the sale closest to the date the turbines failed. If they had, the "object" would have been characterized as the finished vessel, with all necessary components already installed, including the turbines. In fact, the Court completely ignored the paper trail surrounding the various transactions which preceded the loss, looking instead only to what Transamerica Deleval, Inc. - the manufacturer of the allegedly defective product - supplied and which made its way to the ultimate user, the bareboat charterer.[5]

The Court noted:

> [T]he first, second, and third counts allege that each supertanker's defectively designed turbine components damaged only the turbine itself. ***Since each turbine was supplied by Deleval*** as an integrated package . . ., each is properly regarded as a single unit.

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[5] In *East River*, there were a number of "transfers" which took place prior to the turbines failing. There were the initial contracts between Seatrain Lines, Inc.'s subsidiaries and Seatrain Shipbuilding Corp. There were the contracts between Seatrain Shipbuilding Corp. and Transamerica Deleval, Inc. There was the transfer upon completion of construction from the subsidiaries of Seatrain Lines, Inc. to a trustee. Thereafter, the vessels were transferred via bareboat charterer agreements. Presumably, there was many additional agreements between those involved in the design, construction and ultimate sale of the vessels, none of which were deemed pertinent to the Court's product liability analysis.

East River, 476 U.S. at 867. Under this analysis, the Court held:

> For the first three counts, the defective turbine components allegedly injured only the turbines themselves. Therefore, a strict products liability theory of recovery is unavailable to the charterers.

Id. at 875.

In defining "the product" for the purpose of determining whether strict liability was applicable to the charterers claims, the Court simply looked at what the manufacturer supplied. In defining "the product" as the turbines, together with all associated components, the Court did not analyze the actual contract executed by Transamerica Deleval, Inc. Likewise, the Court did not interpret the bareboat charterer agreements in order to determine from whose perspective the inquiry was to begin. Once it determined what the manufacturer had, in fact, supplied, the next step was effortless. Since there were no claims for damage to property other than what Transamerica Deleval, Inc. furnished, there was no strict liability in tort.[6]

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[6] Interestingly, the charterers made no claim for damage to any part of the vessel other than to the turbines. Presumably, under the Court's reasoning, Transamerica Deleval, Inc. would have been strictly liable in tort for such damages. Since it manufactured only the turbines, damage to additional components of the vessel, insofar as Transamerica Deleval, Inc. would be concerned, would be deemed "other property" damage.

Once it was determined that strict products liability was inapplicable, the Court went on to discuss warranty liability and the effect, if any, of certain contractual limitations of liability in favor of Transamerica Deleval, Inc. *Id.* at 875. Noting that the charterers could not have asserted warranty claims against Transamerica Deleval, Inc., the Court commented:

> In the charterers' agreements with the owners, the charterers took the ships in 'as is' condition, after inspection, and assumed full responsibility for them . . . . The contractual responsibilities thus were clearly laid out. There is no reason to extricate the parties from their bargain.

Id. The Court, therefore, looked to the bareboat charter agreements only in the context of potential warranty liability and only after it had defined "the product." The agreements were not used by the Court as a means of defining "the product" or "other property" damage.

Consistent with the above, the Ninth Circuit's adoption of *East River's* "as is" and "benefit of the bargain" language is misplaced given the fact that neither Martinac nor Marco's warranty liability is at issue. The only inquiry which the appellate court needed to make, for purposes of defining "the product," was whether the damages being claimed were for property which defendants supplied at the time the vessel was originally sold.

B.

Looking Through the Eyes of the Manufacturer in Determining Whether "other property" Damage Has Occurred Is Consistent With the Underlying Goals of Strict Liability

In *East River*, the Court rightfully recognized that:

> Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty.

Id. at 866. Consequently, in the Court's view, public policy demanded that responsibility for product defects be fixed where it would most effectively reduce the hazards to life and property inherent in such products that are released into the stream of commerce. *Id.* at 866-67.

Contract law, on the other hand, forces those in commercial relationships to honor the agreements they have made. Since contracting parties - through negotiation - may set the terms of the agreements they make, the failure of a purchaser to receive the "benefit of its bargain" may be considered at the time the agreement is reached. *Id.* at 870. While the manufacturer can restrict its liability, by disclaiming warranties or limiting the purchasers remedies, the purchaser too benefits in that, presumably, less is paid for the product. *Id.* at 873.

In *East River*, the Court sought to maintain the distinction between tort and contract. Its acceptance of the so-called "economic loss rule," however, in no way did away

with strict liability in tort. On the contrary, the Court struck a compromise whereby parties of relatively equal bargaining power would be free to allocate the risk of product defects among themselves, thereby preventing what the Court deemed "indefinite" liability on the part of product manufacturers when damage to the product alone occurs, whereas manufacturers whose defective products cause injury to a person or damage to "other property" would remain accountable for the foreseeable consequences of their actions.[7]

To remain consistent with the *East River* Court's analysis, the "economic loss rule" must be viewed in its proper context, in conjunction with the Doctrine of Strict Liability. While it no doubt attempts to keep parties to the terms of the agreements they strike the rule, likewise, reinforces the notion of strict liability by attributing blame on those who are best suited to prevent injury or damage due to dangerous and defective products, the product manufacturers. Accordingly, in determining in any given case what constitutes "the product," the underlying rationale for the imposition of strict liability must be taken into account and become part of the overall analysis. The case of *Board of*

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[7] As one commentator has noted, "In reality, the [*East River*] decision provides comfort to manufacturers seeking to minimize their responsibility for losses caused by their dangerous products." Steven R. Swanson, *The Citadel Survives a Naval Bombardment: A Policy Analysis of the Economic Loss Doctrine*, 12 Tulane Maritime Law Journal 135, 139 (1987). The author surmised further that, "Of course, litigation will be simplified because the manufacturer will always win these cases under the Supreme Court's holding." *Id.* at n. 22.

Education of the City of Chicago v. A, C and S, Inc., 131 Ill.2d 428, 546 N.E.2d 580 (1989) is highly instructive.

There, certain school districts brought suit against an array of entities who had supplied asbestos containing materials (ACMs) which were, in turn, incorporated into the construction of city schools. The materials at issue included acoustic tile, plaster, insulation and fireproofing material. The school districts alleged that asbestos particles had been released into the atmosphere and, as a result, had contaminated the schools.

The defendants moved to dismiss the actions based, *inter alia*, on the "economic loss rule," arguing that the plaintiffs had failed to sufficiently allege "other property" damage so as to properly fall within the realm of a tort claim. *Id.* at 585. The trial court granted the motions and on appeal the dismissals of the tort claims were affirmed. On appeal to the Supreme Court of Illinois, the dismissals were reversed, the court holding that the plaintiffs had properly alleged "other property" damage. The Supreme Court of Illinois reasoned:

> In regard to the strict liability count, the trial ruled that the ACMs were components and indivisible parts of the building and as such were not a product for strict liability purposes. An item will be considered a product for purposes of the cause of action if to do so will effectuate the policy basis for imposing strict liability in tort . . . . The fact that these [ACMs] are used in the construction and have been installed in a building does not detract from their nature as products separate from the actual structure. We cannot accept the defendants' argument that these ACM's have become permanent fixtures upon real property,

> indistinguishable from the buildings themselves, and to do so would defeat the underlying policy reasons for imposing tort or recovery.

Id. at 591. The lesson to be gleaned is that the "economic loss rule" cannot be viewed in isolation. Its application must coincide with the interests of those which the Doctrine of Strict Liability seeks to protect. Defining "the product" through the eyes of the manufacturer who first places the allegedly defective product on the market promotes the policies of strict liability and, at the same time, provides a workable means whereby exposure may be assessed by those in the chain of distribution. As noted by one commentator:

> . . . [T]he manufacturer is able to predict what damages might arise from the use of his product:
>
> > The manufacturer knows the purpose for which its product is to be used and by whom. Although all purchasers are not identical, the manufacturer can determine within a reasonable range of predictability the ramifications of a product failure . . .
>
> Steven R. Swanson, *The Citadel Survives a Naval Bombardment: A Policy Analysis of the Economic Loss Doctrine*, 12 Tulane Maritime Law Journal 135, 157-158 (1987).

Regardless of whether a downstream sale of an allegedly defective product occurs subsequent to the "first sale," the manufacturer must remain accountable for what it has placed on the market. The fact that the product may change hands at various times through the course of its useful life is irrelevant in terms of defining what "the product" is.

In the case of *T.H.S. Northstar Ltd. Partnership v. W.R. Grace & Co.*, 767 F.Supp. 969 (D. Minn. 1991), another asbestos case, the plaintiff purchased a downtown office building which it later learned was contaminated with asbestos containing materials. The building was purchased in 1986. Although the asbestos had been installed as part of the building's original construction and, thus, transferred by the prior owner to the plaintiff at the time title passed, the court - relying on *East River* -found "other property" damage, i.e., damage to the facility from the release of asbestos fibers, so as to justify recovery in tort.

The fact that a sale between private parties occurred subsequent to time the asbestos had originally been installed was a non-issue. Rejecting the defendants' assertion that the claim was precluded by the "economic loss rule," the district court simply looked to what the asbestos manufactures had supplied and whether or not damage to property, other than product furnished, had occurred. *Id.* at 972-974; *See also Lavwma v. Northwest Pipe & Casing Co.*, 915 F.Supp. 1066, 1071 (N.D. Cal. 1995) (where the district court, although rejecting plaintiff's claims of strict liability arising out of the delamination of a coal tar enamel lined pipe manufactured by defendants for use in plaintiff's wastewater export pipeline, noted that recovery would have been allowed had the defect complained of damaged. ". . . any separate property, such as a valve or other component of the pipeline . . . outside of the pipe itself."); *Northridge Co. v. W.R. Grace & Co.*, 162 Wis.2d 918, 471 N.W.2d 179 (1991) (where the court, finding "other property" damage under the *East River* analysis, permitted a strict liability action where defendant manufacturers supplied asbestos containing materials to a general contractor who, in turn, incorporated same into the facility it had furnished to the plaintiff); *City of Manchester v. Nat'l Gypsum Co.*, 637 F.Supp. 646 (D.R.I. 1986) (where

in a pre - *East River* decision-the court found asbestos released into the atmosphere had caused "other property" damage so as to preclude application of the "economic loss rule"); *International Knights of Wine, Inc. v. Nave Pierson Winery, Inc.*, 110 Cal. App.3d 1001, 168 Ca. Rptr. 301, 304 (1980) (where Justice Fleming, in his concurring and dissenting opinion, noted that the reasoning of *Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal. Rptr. 17 (1965) - which was embraced by the Court in *East River* - would allow recovery against manufacturers of defective bottle caps which damaged wine contained in bottles upon which the caps were placed, the wine insofar as the bottle cap manufacturers were concerned amounting to "other property" damage and not "economic loss"); *Sacramento Regional Transit Dist. v. Flxible*, 158 Cal. App.3d 289, 204 Cal. Rptr. 736, 741 (1984) (where the court characterized the damage alleged in *International Knights, supra,* as properly alleging physical injury to plaintiff's wine caused by the defective caps plaintiff had purchased); *Kodiak Elec. Ass'n, Inc. v. Deleval Turbine, Inc.*, 694 P.2d 150, 152-54 (Alaska 1984) (where the court affirmed the imposition of strict liability where defective turbines incorporated into a diesel generator which failed and damaged an unrelated component of plaintiff's electrical power generation system, a component which the defendant did not supply, leaving in tact the trial court's finding of "other property" damage); *Hamilton Fixture Co. v. Anderson,* 285 So.2d 744 (Miss. 1973) (where the court upheld the giving of an instruction on strict liability where the manufacturer incorporated an allegedly defective humidifier as part of the central heating and cooling system installed in a new home, although the defendant had sold a "finished product" to parties who, in turn, had sold the house

which sustained damage to plaintiffs); *Fordyce Concrete, Inc. v. Mack Trucks, Inc.*, 535 F.Supp. 118 (D.Kan. 1982) (where the court upheld imposition of strict products liability a against manufacturer of a defective truck chassis which damaged a concrete mixer assembly affixed thereafter, finding same to be "other property," since the mixer assembly which sustained damage was not the item which the defendant manufacturer had supplied).

II.

THE NINTH CIRCUIT'S ANALYSIS IMPROPERLY DETERMINES A MANUFACTURER'S STRICT LIABILITY FOR A DEFECTIVE PRODUCT ON AN UNRELATED ACT OF A THIRD PARTY WHICH PLAYED NO ROLE WHATSOEVER IN PLACING THE PRODUCT ON THE MARKET IN THE FIRST INSTANCE.

The Ninth Circuit in *Saratoga* ignored the teachings of *East River* by defining Martinac and Marco's liability solely in terms of what Madruga, a private consumer, transferred to Saratoga Fishing. Madruga, however, was not a "seller" engaged in the business of selling vessels or component parts thereof. To set the parameters of a manufacturer's liability in tort based on the act of a non-seller, which plays no role whatsoever in placing a defective product on the market, is not only illogical but undermines the doctrine of strict liability as embodied in Section 402A of

the *Restatement (Second) of Torts*[8] and accepted by the Court in *East River*.

Accepting the Ninth Circuit's reasoning places Madruga, a commercial consumer, in the shoes of Martinac and Marco, the manufacturers of the allegedly defective hydraulic system, for purposes of determining what the defendants' "product" entailed. This is improper.

Section 402A of the *Restatement (Second) of Torts* applies as a general rule to "sellers" engaged in the business of selling allegedly defective products.[9] Consistent with the Court's analysis in *East River*, therefore, the limit of a manufacturer's liability is predicated on a determination of

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[8] The *Saratoga* Court approach further conflicts with established prior decisions of the Ninth Circuit wherein Section 402A was adopted as the law of the Ninth Circuit relating to products liability. *See Pan-Alaska Fisheries v. Marine Constr. & Design Co.*, 565 F.2d 1129 (9th Cir. 1977).

[9] This requirement is by no means a novel concept. It has long been held that strict liability applies only to those in the chain of distribution or, in other words, engaged in the business of selling products. *See Kealoha v. Du Pont De Nemours & Co.*, 82 F.3d 894 (9th Cir. 1996); *Muniz v. Ransomes America Corp.*, 921 F.Supp. 438, 442 (S.D. Tex. 1995) (for strict liability purposes, the defendant must have not only "supplied" the product but also must be engaged in the business of placing such products into the stream of commerce); *Bukowski v. Geo. A. Hormel & Co.*, 157 F.R.D. 50 (S.D. Iowa 1994) (strict liability not applicable to a one time seller of a piece of machinery); *Green, III v. Whiteco Industries, Inc.*, 17 F.3d 199, (7th Cir. 1994) (same).

what the manufacturer initially placed on the market, or stated another way, sold to the original purchaser. *East River*, 476 U.S. at 867; *Nicor Supply*, 876 F.2d at 506. A "seller" under Section 402A is unequivocally not a consumer such as Madruga reselling a used product to another consumer such as Saratoga Fishing.

Since Madruga was not "engaged in the business" of selling vessels, the object which he passed on to Saratoga Fishing at the time of the "second sale" cannot, and should not, serve to shape the liability of Martinac and Marco, the original product manufacturers.

A.

The Downstream Transfer of an Allegedly Defective Product Cannot Serve to Remanufacture "the Product" Which Was Originally Marketed

The Ninth Circuit, in essence, held that Madruga - by outfitting the vessel prior to its transfer to Saratoga Fishing - remanufactured "the product" which Martinac and Marco originally sold. The absurdity of allowing a subsequent act, unrelated to the initial design, manufacture and distribution of the product, to dictate ultimate responsibility for the losses sustained by Saratoga Fishing may be illustrated by two simple analogies to situations which arise in the civil litigation context each day.

The first example concerns the attorney-client privilege. It is common knowledge that, once a professional relationship is created for the purpose of obtaining legal advice, all communications, whether oral or written, between attorney and client are deemed "privileged" and, thus, protected from disclosure. The privilege, however, is not

absolute. In order to determine whether or not protection from disclosure will be afforded, the substance of, together with the facts and circumstances surrounding, the communication must be evaluated. With this in mind, it a generally accepted proposition of law that:

> [A] party cannot conceal a fact merely by revealing it to his lawyer, nor may he secrete a pre-existing document merely by giving it to his attorney.

State Ex. Rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis.2d 559, 581, 150 N.W.2d 387 (1967). In other words, the act of communicating with one's attorney cannot by any means convert non-privileged information into a protected communication. Stated another way, an independent, subsequent act cannot change the overall character of the communication that originally took place.

Similarly, all involved in litigation have grappled with the ever-present "hearsay rule" of exclusion and the plethora of exceptions which have been carved out along the way. Of significance to this discussion is what is referred to as the "business record exception." As a general proposition, a document kept by a litigant in the ordinary course of business will be shielded from the preclusive effect of the "hearsay rule." Where, however, one simply places a document generated by another in his file, the exception will not apply since the document, although kept by the party seeking its introduction, was not prepared by such party. *See, e.g., Phillips v. United States*, 356 F.2d 297, 307 (9th Cir. 1965). Thus, the act of placing another's document in one's file, an act wholly unrelated to the preparation of the document itself, does not create a "business record" for purposes of applying the exception to the "hearsay rule."

The two examples cited above illustrate, quite clearly, the shortcomings of the Ninth Circuit's approach. By focusing on the subsequent, unrelated act of Madruga in transferring title of the vessel to Saratoga Fishing, the *Saratoga* Court allowed the acts of an independent, third-party (a non-seller, a non-manufacturer, a private consumer), acts which occurred long after the product was first sold, to completely alter the character of the product which Martinac and Marco placed on the market. In the Ninth Circuit's view, "the vessel" which was originally supplied was transformed via the "second sale" (a one time sale by a private concern, to another private concern), into a fully outfitted fishing vessel, complete with a skiff, seine net, processing equipment and the like. Although the item which Martinac and Marco initially supplied had, in actuality, remained the same, the liability exposure which previously existed vanished.[10]

Just as one cannot convert a non-privileged document into a protected communication by turning it over to his attorney, and cannot create a "business record" out of a

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[10] Ironically, the Ninth Circuit deemed "the sale" of the vessel to Saratoga the crucial event upon which liability would arise or disappear. What is ironic about the appellate court's approach, i.e., looking to the last sale of the item as opposed to the item which the manufactures placed on the market, is that imposition of strict liability does not require that "a sale" in the technical sense actually take place. *See Anderson v. Olmsted Utility Equipment, Inc.*, 60 Ohio St. 3d 124, 573 N.E.2d 626 (1991). If strict liability is not dependent on "a sale," it would seem improper to deem such "a sale" the mechanism for determining if accountability is justified or not.

document prepared by another, a private consumer transferring title to a previously manufactured item cannot remanufacture a product.

B.

A Manufacturer's Ultimate Liability for Product Defects Should Not Depend on the "Luck" of the Draw

In *Seely, supra.*, the appellate court recognized that:

> The distinction . . . between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury . . . .

Seely, 63 Cal.2d at 18, 403 P.2d at 151. The court's observation is well taken and applies equally to the present case. Simply stated, a manufacturer's liability for damages resulting from defective products should not depend on the "luck" of the manufacturer that its product or component will be sold to another (one other than the original purchaser) prior to injury or damage being caused.

Martinac and Marco should not be permitted to escape liability simply because Madruga (the original purchaser) just so happened to transfer the vessel to Saratoga Fishing. Had the transfer not taken place as of the date of the hydraulic failure, neither Martinac nor Marco would be protected, although the same product defect would be responsible for the same damages sustained.

Products liability arose out of a public policy concern that consumers needed added protection from dangerous and

defective products than existed under the law of warranty. Martinac and Marco's liability (or any product manufacturer for that matter) for precisely the same damage, caused by precisely the same product defect, should not turn on whether, by pure "luck," its product happens to be sold before the defective condition manifests.

The case of *Rosenau v. City of New Brunswick, N.J.*, 51 N.J. 130, 238 A.2d 169 (1968), a pre-*East River* decision, supports the rejection of the Ninth Circuit's approach. There, the City of New Brunswick purchased sixty (60) water meters from Worthington Gamon Meter Company of Newark ("Worthington") for incorporation into its municipal water system. The City installed one of the newly acquired meters in the home of plaintiffs. Years later, the meter in plaintiffs' home broke, causing damage to the premises.

After suit was filed, the plaintiffs' strict liability action was dismissed upon Worthington's motion for summary judgment. Plaintiffs sought certification for review by the Supreme Court of New Jersey - which was granted.

Addressing whether or not the plaintiffs were entitled to proceed in strict liability against Worthington (the manufacturer of the allegedly defective product), the Supreme Court of New Jersey commented:

> The Appellate Division's opinion seems to stress the fact that Worthington sold the meter to the City and never intended that the meter would be sold to the public . . . . But it knew that the meter would be incorporated by the City into its water supply system and that members of the public would come in contact with it when it was placed in their home. It also knew that if the meter was manufactured

> defectively . . . serious harm to persons and property would probably result.

Id. at 175. The New Jersey Supreme Court determined that plaintiffs were entitled to proceed under a strict products liability theory of recovery and remanded the case. In so holding, the court reasoned:

> The Appellant Division was apparently persuaded by the hardship which may result to Worthington by the plaintiffs pursuit grounded on strict liability in tort . . .
>
> * * *
>
> [A]lthough the plaintiffs will be relieved of the responsibility of affirmatively establishing failure to exercise due care in the process of manufacture, they will still have the burden . . . of establishing that the meter was actually defective . . .
>
> * * *
>
> On the other hand, the hardship to the plaintiffs under the Appellate Division's approach would indeed be severe . . . In considering the relevant hardships we must not lose sight of the crucial fact that Worthington originally placed the allegedly defective product in the stream of trade. As manufacturer and distributer it is the one best situated to protect against consequential damage as a business risk of distribution whereas the injured parties are wholly innocent and largely incapable of protecting themselves.

Id. at 176.

The wisdom of *Rosenau* court's discussion is readily apparent. Although the decision was not mentioned in *East River*, the reasoning ultimately adopted by the Court mirrored that of the New Jersey Supreme Court espoused nearly twenty years before. The New Jersey Supreme Court, like the Court in *East River*, ignored the fact that - prior to the incident giving rise to the claim - the allegedly defective product had changed hands. Both courts looked simply to what the manufacturer had placed on the market. In *Rosenau*, it was of no consequence that the product furnished by Worthington had been incorporated into the City's water supply system and then resold to the plaintiffs.

III.

CONCLUSION

The Ninth Circuit's decision turns the Court's analysis in *East River* on its head, creating inconsistency among the Circuits, inconsistency which will severely impact land-based and marine products liability actions alike.

The *Saratoga* decision treats private consumers as product manufacturers and sellers and manufacturers of defective products as innocent bystanders.

If *Saratoga* is allowed to stand, the clear distinction between tort and contract will eventually disappear. The "other property" exception will cease to exist since, each time a product is sold or modified, the manufacturer's liability for what it originally placed on the market diminishes.

Practicality, predictability and public policy mandates that *Saratoga* be reversed and that approval be given to the

straightforward and workable interpretation set forth by the Fifth Circuit in *Nicor*.

DATED this 27th day of November, 1996.

RESPECTFULLY SUBMITTED

Michael H. Williamson
Madden, Poliak, MacDougall & Williamson
1001 Fourth Avenue Plaza, Suite 2800
Seattle, Washington 98154-1106
(206) 621-1011

Steven B. Fisher
Kostow & Daar
200 South Wacker Drive, Suite 3800
Chicago, Illinois 60606
(312) 474-1404

Of Attorneys for All Alaskan Seafoods, Inc.